December 11, 2000

Ms. Janice Mullenix
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2000-4662

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 142036.

The Texas Department of Transportation (the "department") received a request on September 27, 2000, for a complete copy of an audit report with supporting documentation for a specific audit; copies of the requestor's performance plans and evaluations from 1988 to the present; and documents and testimonies received and used to arrive at decisions, audit findings and the basis for recommendations regarding that specific audit. On October 1, 2000, the department received another request from the same requestor, which the department identifies as a clarification, that contains essentially the same request for documents as the previous request. The October 1, 2000, request includes a request for audit working papers regarding the specified audit. You state that you have released a copy of the audit report in question and will provide copies of job evaluations and performance plans to the requestor. You claim that the remaining information is excepted from disclosure under section 552.116 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially we note that section 552.022(a)(1) specifically provides that "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body" is public information and not excepted from required disclosure unless they are expressly confidential under other law or except as provided by section 552.108 of the Government Code. The department raises section 552.116 as excepting the submitted information from public disclosure. However, section 552.116 is a discretionary exception under the Act and is,

therefore, not "other law" for the purposes of section 552.022(a)(1).[1] Therefore, we conclude that the Budget Monitoring Reports for fiscal years 2000 and 2001 for the Abilene district are public under section 552.022(a)(1), and therefore must be released to the requestor. We have marked with green tags the information to be released pursuant to section 552.022(a)(1).[2]

Section 552.116 of the Government Code, as amended by the Seventy-sixth Legislature, provides in relevant part:

> (a) An audit working paper of an audit of the state auditor or the auditor of a state agency or institution of higher education as defined by Section 61.003, Education Code, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [required public disclosure] by this section.

> (b) In this section:

>> (1) "Audit" means an audit authorized or required by a statute of this state or the United States and includes an investigation.

>> (2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

>>> (A) intra-agency and interagency communications; and

>>> (B) drafts of the audit report or portions of those drafts.

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[1] Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer's privilege), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

[2] We note here your assertion that this office committed "manifest error" in OR2000-3707 by ruling that information posted on the department's website was public under section 552.022, based on a header containing an "http" reference, when this information was in fact contained on the department's *intranet* site. Your assertion is incorrect. We ruled that the information was public under 552.022, not on the basis of a "supposition," as you claim, but based on the fact that we were able to view the information ourselves through the department's *publicly accessible* website.

Gov't Code § 552.116. After reviewing your arguments and the submitted information, we find that most of the submitted information falls within the purview of section 552.116 of the Government Code. Consequently, the department may withhold the submitted information from required public disclosure under section 552.116, with the exception of the Budget Monitoring Reports as noted above.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.–Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/er

Ref: ID# 142036

Encl: Submitted documents

cc: Mr. Dan Richardson
         3110 Shepherd
         Abilene, Texas 79605
         (w/o enclosures)